SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 858

DAVID P. LAVIETES,
Petitioner (Plaintiff-Appellant),

vs.

FERRO STAMPING AND MANUFACTURING COMPANY, A MICHIGAN CORPORATION; JOHN H. ROETHEL; WILLIAM C. DEVEREAUX; ELMER J. GRAY; ACKERMAN BLAESER & FEZZEY, INC., A MICHIGAN CORPORATION; TERNSTEDT MANUFACTURING COMPANY, A MICHIGAN CORPORATION; AUTOMOBILE VENTILATION, INC., A MICHIGAN CORPORATION; AND DETROIT HARVESTER COMPANY, A MICHIGAN CORPORATION,

(Defendants-Appellees).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Grounds for Jurisdiction.

This Court has jurisdiction of this matter by virtue of Section 240, (a) of the Judicial Code as amended by Act of February, 1925, being 28 U. S. C. A. Section 347 (a),

governing appeals by certiorari from the Circuit Court of Appeals to the Supreme Court.

II.

Decree of the Circuit Court of Appeals.

The Circuit Court of Appeals delivered no opinion but merely adopted the opinion of the lower court and affirmed it as follows:

> This cause having been submitted upon the record, briefs and argument of counsel for the respective parties, and it appearing to the Court for the reasons stated in the lower court's opinion, findings of fact and conclusions of law, that its decree in all respects should be affirmed, it is so ordered.
>
> Entered June 25th, 1941.

Opinion of District Court.

The opinion of the District Court was delivered by the Honorable Arthur J. Tuttle on December 17th, 1937, but has not been reported. It contains twenty-nine (29) printed pages, found in the record (R. 91-120, inclusive).

Nature of Case.

This is a suit in equity to construe two (2) contracts, Exhibits 158 and 159 (R. 1188-A to 1188-D, Vol. III), as one (1) instrument, both having been executed simultaneously, under which agreement the plaintiff was denied an accounting by the District Court. The District Court determined that the two contracts are separate instruments and that plaintiff had no rights under Exhibit 159, although this contract expressly referred to Exhibit 158 as a part thereof, in providing that the royalties due thereunder shall be payable on the same agreements, terms and conditions contained in Exhibit 158, under which contract plaintiff was

entitled to one-half (½) of the royalties. The construction given by the District Court, and affirmed by the Circuit Court of Appeals, is against the intent of the parties, as disclosed by the two instruments and the undisputed testimony, and is contrary to the general principle of law and the decisions of this Court.

This Honorable Court has jurisdiction of this case, under the statute above quoted, and we refer to cases cited under 28 U. S. C. A. 347, including

Warner v. *New Orleans,* 176 U. S. 474;

Forsythe v. *City of Hammond,* 166 U. S. 506.

Statement of the Case.

The facts stated below are undisputed except where otherwise indicated.

In the early part of 1928 defendant Roethel operated a small automobile body repair shop in Brooklyn, N. Y. He had three patents for vehicle window regulators. Plaintiff, Lavietes, was a salesman particularly experienced in the sale of automobile accessories, and had known Roethel for a short time prior to 1928. Roethel, who had tried unsuccessfully to market his inventions, through his own efforts and the assistance of others, was deeply in debt at the time. His financial backers refused to furnish any more money for what seemed a hopeless venture. He convinced Lavietes, the plaintiff, however, that he had many improvements in mind upon his inventions which could be perfected and marketed. Lavietes claims an agreement was finally made between the two during the summer of 1928 whereby Lavietes was to finance the work and to market the inventions upon the understanding that whatever profits might accrue would be shared equally between them.

Lavietes paid the costs of the numerous trips and other expenses incurred by him in his efforts following 1928 to commercialize these inventions, and furnished money for

Roethel's living expenses, who was constantly busy attempting to improve his devices.

The District Court described the arrangement between Lavietes and Roethel, in a part of its opinion, as follows:

(R. 100):

> "* * * but undoubtedly they talk about a 50-50 and that seems to be the usual thing for inventors and helpers to talk about, but it is that sort of indefinite tangible understanding that these men had, always looking forward to a day when, if anything developed and there was some money in sight, that they would make a definite agreement, and each trust in the other."

(R. 101):

> "The agreement was that if they get something, they get a prospect somewhere he (Lavietes) would bring this back and show it, tell it to Roethel, and if Roethel was satisfied, and the other party would stick and keep, why, then, that is where Lavietes got something out of it."

During the year 1929 Roethel developed what are called the double arm and parallel arm window regulators. Models of the improved devices were made at the expense of Lavietes, who then went out to either sell them or interest someone to manufacture same. By this time Lavietes had been compelled to borrow money on his insurance to continue work.

Lavietes brought a model double arm regulator to Detroit and showed same to the Engineer of Briggs Manufacturing Company, a large manufacturer of automobile bodies. The engineer called in Mr. Fairbanks, the Sales Manager of defendant, Ferro Stamping and Manufacturing Company, a large supplier of parts for the Briggs Manufacturing Company. At the suggestion of the engi-

neer, Mr. Fairbanks took Lavietes to see Mr. Devereaux, President of the Ferro Company, where the window regulators were demonstrated.

After Mr. Devereaux learned that the Lincoln Division of the Ford Motor Company had commended the device in addition to the engineer of the Briggs Manufacturing Company, negotiations were begun about June, 1930, towards the granting of a license to the Ferro Company, for the manufacture of the Roethel inventions.

On August 15, 1930, Ferro agreed to take a license and upon the insistence of Lavietes agreed to hire Roethel as an engineer to supervise the work of perfecting the design of window regulators at a salary of One Hundred ($100.00) Dollars per week. Five Hundred ($500.00) Dollars was paid to Lavietes on that date to bind the bargain, and he gave a receipt in which the inventions were described as:

> "Patents and patents pending owned by John H. Roethel and controlled jointly by Mr. Roethel and myself." (R. 1184).

Lavietes then went to New York to arrange for the removal of Roethel to Detroit, and Roethel started to work for the Ferro Company on September 2, 1930.

The final draft of the agreement, Exhibit 158, was ready for signature on September 6, 1930, and Lavietes was called to the Ferro Company offices to execute the agreement. The agreement as presented, however, was not satisfactory to Lavietes because it did not give protection against possible claims of Ferro to shop rights on inventions which might be made by Roethel while in their employ, so a supplemental agreement was prepared by Ferro (Exhibit 159). Both instruments were thereupon signed simultaneously.

The balance of the down payment, or Twenty-Five Hundred ($2,500.00) Dollars, was paid on September 6th, 1930.

September 2nd, 1930, Roethel had started to perfect the construction of the double arm window regulator in the Ferro Company shops and completed it on September 9th, 1930. Shortly thereafter he made a model of his parallel arm regulator. Patent applications for the two inventions were duly filed thereafter. On September 15th, 1930, Roethel reported the completion of a "Perfekt" model regulator to Lavietes, and asked Lavietes to pay Judge Galston for the patent expenses of prior window regulators, which Lavietes did on September 17th, 1930.

On September 18th, 1930, Roethel telegraphed Lavietes:

"Fer money to my wife for expenditures to Detroit",

and said he had to pay his patent "lawer" in Detroit One Hundred Seventy-Five ($175.00) Dollars tomorrow, and that "if the pattens are not proteckedt we will lose everything" (R. 1197 and 1039):

Lavietes replied that he had written to Mr. Devereaux requesting him to pay the attorneys and charge the expense to the account of Lavietes and Roethel in accordance with the contracts, but that if Mr. Devereaux did not pay it, he, Lavietes, would borrow the money to take care of the expense (R. 1198-B). Lavietes wrote to Mr. Devereaux also and asked Ferro Company to pay the patent expense and to charge it to the joint account of Roethel and Lavietes (R. 1198). On October 10, 1930, Lavietes again wrote Mr. Devereaux to the same effect (R. 1202), but Mr. Devereaux never made any objection thereto. On October 20, 1930, Lavietes asked Mr. Devereaux for a sample double arm regulator (R. 1204) and Mr. Devereaux replied on October 31st, 1930 (R. 1205) as follows:

> "In answer to your several letters, the writer has been laid up with illness, or so busy * * * I have been unable to go into the several matters mentioned. * * * We are having some encouragement from

Ford and Durand on regulators, and I believe that we will be able to do some real business when there is any new business to be secured."

On November 10th, 1930, plaintiff, Lavietes, again wrote Mr. Devereaux and requested a sample of the perfected regulator in order that he might show it in Syracuse and Brooklyn. On November 11th, 1930, Mr. Devereaux replied that no duplicates were available.

On November 10th, 1930, Lavietes having learned that Roethel had been in New York and had not called to see him, wrote Roethel as follows:

"* * * Your attitude towards me after all I have gone through to put the regulator into the Ferro Company is not so good and if you feel it is asking too much to keep me posted, do not answer this letter.

"Your telling people that I got $3,000 for my own use from the Ferro Stamping Co. is not the truth, as I received $1,500 as my share, $500 without interest as payment for personal loan to you, when you needed same to meet mortgage on your house, and $500 as half of the $1,000 that you received from Jesse Jacobs,* which I was forced to pay with interest as you are well aware, the note having been signed in your office in Brooklyn.

"I know full well that you through Mr. Brashner offered to sell your inventions to Mr. Fisher, when you were supposed to be on a trip to a wedding in Indianapolis.

"Straight shooting and plain honesty pay big dividends and I hope from now on you will treat me as I have always treated you. With best regards to the family, I am,

Very truly yours."

* This reimbursement to Jacobs is confirmed by both Jacobs (R. 656, 659) and Roethel (R. 1031).

An interference was declared in the patent office upon the applications of Mr. Roethel and it became necessary

to prove the date of conception of the two inventions. On September 18th, 1932, in connection with such interference proceedings, Roethel wrote Lavietes as follows:

> "I have filed applications in the U. S. Patent Office, and I am informed from Washington that Dura Company from Toledo and Briggs, Stratton, and Milwaukee have the same applications on file. * * * We must prove the earliest date of the invention. * * * I am sure they stole their invention from us. The regulator is standard equipment on all new Ford car and Dura Co. of Toledo is the only one supplying Ford with the regulator. * * * If we win the patent then we can collect a royalty on all Ford regulators. * * * 'I am here in Detroit two years, and didn't receive any royalties yet. * * * And if you and I will not help together and keep everything that we know to ourselves we will lose everything. * * * Please destroy this letter after reading it." * * *

Roethel had in fact received Three Thousand ($3,000.00) Dollars from Ternstedt five (5) months before (See Physical Exhibit 239, p. 332, also Exhibit 225, R. 1238).

The Ferro Stamping and Manufacturing Company, by its Assistant Treasurer, D. E. Allen, wrote to Lavietes under date of December 2nd, 1930 (Exhibit 187, R. 1210), which enclosed a proposed amendment to Exhibit 158, so as to permit the suspension of royalties accruing during the period which any suit mentioned in paragraph 7 might affect the payment of royalties. The application for the double arm and parallel arm inventions of Roethel had then been filed in the patent office, and this proposed amendment evidently applied to the double arm and parallel arm regulators, as Ferro was preparing for production on these regulators—the interference proceedings in the patent office involving these inventions developed subsequent to this letter. No interference proceedings were had in the patent

office relating to the patents which were specifically mentioned in Exhibit 158, and were never commercialized.

Exhibit 187 uses the following language:

> "Dear Mr. Lavietes:
>
> "With reference to our agreement with you dated Sept. 6, 1930 concerning the manufacture and sale of Vehicle Window Regulators we submit herewith a paragraph, indicated as No. 7-A, which we believe should be incorporated in the original agreement.
>
> "The purpose of same is to clarify the procedure involved in paragraph 7. Mr. Roethel has signed same.
>
> "If you will kindly sign each of the three copies and return to the writer we will then have Mr. Devereaux's signature inscribed and your copy returned to you."

The commercial manufacture of the regulators was commenced in March of 1931, but Lavietes was never informed of the fact. Roethel received an advance royalty from Ternstedt Mfg. Co. in April of 1932, yet in the letter written on September 18, 1932 recited above, he wrote Lavietes:

> "I am here in Detroit two years and didn't receive any royalties yet."

On April 22, 1931, Mr. Devereaux replying to the inquiry of Lavietes, as to progress being made in the perfecting and manufacturing of the window regulators, replied:

> "We are making some progress with this type of lift, but to date have not secured any orders."

The Ferro Co. was in production on Roethel's parallel arm regulators at the time. On February, 1932, in answer to an inquiry from Mr. Lavietes, the plaintiff, Mr. Devereaux replied:

> "* * * Roethel is still with us and is capable and enthusiastic worker. We are all hopeful that sometime in the future favorable results will be obtained."

On January 11, 1933, Lavietes wrote to Mr. Devereaux and asked him for a clear statement as to the situation regarding the window regulators. On January 17, 1933, he received the following reply:

> "Up to the present time Mr. Roethel has not developed any window regulators which we have manufactured that could be construed as coming under the terms of our agreement with you. * * *
>
> "Eventually it is more than likely that Mr. Roethel's patents will be allowed, but we can do nothing to stop this infringement until his patents are issued. * * *"

During this time the interference proceedings were pending in the patent office and Lavietes was procuring evidence in New York relating to the matter of priority. In May, 1933, the testimony of Mr. Lavietes in the double arm interference was taken on behalf of Roethel in New York and under direct examination by defendant Gray, Lavietes testified in detail as to his efforts and expense in connection with the development of the double arm regulator and the marketing of it. Lavietes testified that he was financially interested in the invention, but upon Mr. Gray's objection he was not permitted to testify the extent of his interest except that it was a substantial one.

In the early part of January, 1934, Lavietes first learned from the vice-president of Ternstedt Manufacturing Co. that $3,000 in royalties had been paid to Roethel, and as a result of which Lavietes wrote Roethel on January 10, 1934, as follows:

> "I am not making any claim to my one-half interest in your deal with Ternstedt Manufacturing Co., as I did not give you permission to enter this, or any other deal without my written consent, I being bound by contract to Ferro Stamping Co."

The letter written by Lavietes to Roethel was turned over to defendant Gray who, for the first time notified plaintiff

Lavietes that he, Lavietes, is laboring under a "misunderstanding as to the extent of the contract which you made with the Ferro Co."

In the interference proceedings Roethel was found to be the prior inventor and patents were duly issued to him. After the receipt by Lavietes of the letter written by Mr. Gray, efforts were made to adjust the matter between the parties, but when they proved unsuccessful, suit was commenced by the plaintiff.

The bill charges conspiracy to defraud. It sets out in detail all of the acts of the various parties relating to this matter, the oral contract made by Lavietes and Roethel, the subsequent written agreements and the acts of the parties thereafter to the date of the filing of the bill. The prayer in the bill asks for construction of the written instruments, reformation of the written instruments, accounting and injunction among other things. The bill has the usual prayer for general relief.

It was definitely established by the evidence that the double arm regulator had been invented by Roethel prior to the execution of the contracts on September 6, 1930, as in the interference proceedings he testified as follows:

(Physical Exhibit 239, referred to R. 1249):

> "Q. 153. I will show you this regulator which is Exhibit 7 (double arm regulator) and ask you if you know anything about that? A. * * * That is a Ford type regulator. * * *
>
> "Q. 158. How soon after you went to work for Ferro on September 6, 1930 did you start work on this regulator? A. I worked before I signed the contract.
>
> "Q. 159. Do you remember when you completed the regulator Exhibit 7? A. According to the stamp on it, September 9" (1930).

Specifications of Error.

Petitioner contends that the Circuit Court of Appeals, by its decree, which affirmed the opinion and findings of fact

and law of the District Court, dismissing plaintiff's suit, and denying him the relief prayed, committed manifest error.

Summary of Argument.

A. Intent of the parties govern the interpretation of contracts.

United States v. *Choctaw*, 179 U. S. 494, 45 L. Ed. 291, 21 S. Ct. 149;
George v. *Tate*, 102 U. S. 564, 26 L. Ed. 1050;
Hubbard v. *Miller*, 27 Mich. 15;
Reid v. *Shaffer*, 249 Federal 553;
Stair Corp. v. *Taylor*, 39 F. (2d) 788;
Cleveland v. *Detroit Trust Co.*, 264 Mich. 253;
Detroit Trust Co. v. *Manilow*, 272 Mich. 211;
Hammond, et al. v. *The Mason & Hamlin Organ Company*, 92 U. S. 724, 725, 23 L. Ed. 767, 768;
Doherty Research Co. v. *Vickers Petroleum Co.* (C. C. A. 10), 80 F. (2d) 809, 811, Cert. Den. 81 L. Ed. 401;
Mobile Railroad Co. v. *Jurey*, 111 U. S. 584.

B. Defendants are estopped from claiming that plaintiff-appellant is not entitled to one-half of the royalties under the contract.

Daugherty v. *Byles*, 41 Mich. 61;
Fenton v. *Steere*, 76 Mich. 405;
Nielson v. *Eiler*, 248 Mich. 545;
Home Insurance Co. v. *Field*, 53 Ill. Appeal 119;
Sweetser v. *Jordan*, 211 Mass. 393.

22 *Corpus Juris*, p. 329, states:

> "So far as its competency in evidence is concerned, the admission may be made either in the case in which it is sought to be used or in some other action."
>
> *Shelton* v. *Southern Railroad Co.*, 225 Fed. 182;
> *Cline* v. *Wilson*, 128 Mich. 255;
> *Billingsley* v. *Gulick*, 256 Mich. 606;

Gates v. *Detroit Railroad Co.*, 158 Mich. 477;
People v. *Finn*, 162 Mich. 481;
Carver v. *Detroit & Saline Plank Road Co.*, 126 Mich. 458.

C. Plaintiff-appellant is entitled to recover upon an accounting for the royalties and profits received by the defendants.

E. R. Squibb & Son v. *Mollinck Chemical Works*, 69 F. (2d) 685;
Gulf Smokeless Coal Co. v. *Sutton, Steele & Steele*, 35 F. (2d) 433;
Walker Grain Co. v. *Southwestern Telephone & Telegraph Co.*, 10 F. (2d) 272;
Skinner Bros. Belting Co. v. *Oil Well Improvement Co.*, 54 F. (2d) 896;
A. C. Motor Freight Lines v. *Singledecker*, 70 F. (2d) 827.

ARGUMENT.

A. Intent of the Parties Govern the Interpretation of Contracts.

The contracts, Exhibits 158 and 159, included in their scope the parallel and double arm regulators. The two instruments must be construed as one contract.

In *Hammond, et al.* v. *The Mason and Hamlin Organ Company*, 92 U. S. 724, 725, 23 L. Ed. 767, 768, this Court says:

> "Where an inventor signed several different agreements with the same party, on the same day, for the sale of his invention and for a license to use it, they must be all construed together."

As the court says in *Doherty Research Co.* v. *Vickers Petroleum Co.* (C. C. A. 10), 80 F. (2d) 809, 811, Cert. Den. 81 L. Ed. 401:

> "They (the several instruments are integral and interwoven parts of the whole; they constitute the suc-

> cessive steps taken in originating and consummating the transaction. It cannot be said that the assignment with a separate agreement, is complete and inexhaustive within itself to the exclusion of the other instruments. * * * The several instruments bear the same significance in law as though their respective provisions were incorporated in a single writing and should be read together in determining the real intent and agreement of the parties."

The intention of the parties to include all window regulators in the agreements, Exhibits 158 and 159 to which Lavietes is entitled to one-half of the royalties, may be gathered from the circumstances surrounding the execution of Exhibits 158 and 159.

In *Mobile Railroad Co.* v. *Jurey*, 111 U. S. 584, this Court says:

> "The intention of the parties must be ascertained from the nature of the agreement, the circumstances leading up to and attending its execution, the relation and condition of the parties, the situation of the subject matter, and the apparent purpose of the contract. * * *
>
> Even 'where a strict and literal construction of the contract does not convey the real meaning of the parties, such construction is not to be entertained.' Seralles *v.* Esbri, 200 U. S. 103; U. S. *v.* Utah, N. & C. Stage Co. (U. S.), *supra;* Walden *v.* Skinner, 101 U. S. 577, 25 L. Ed. 963. '* * * the grammatical rule raises only a *prima facie* presumption and does not preclude the settling of the meaning (of the contract) by detracting somewhat from the exactness of the language in order to give effect to more cogent reasons of another sort.' Cowles Electric Smelting Co. *v.* Lowery (C. C. A.-6), 79 Fed. 331, 340. 'The contract must be read according to the intent of the parties in spite of clerical errors and omissions.' 17 C. J. S. 734."

That this conclusion is inescapable appears from a cursory reading of the two instruments. The second paragraph of Exhibit 158 reads:

> "Whereas, the parties of the first part have '*made certain improvements*' (emphasis ours) in vehicle regulators who owned the patents bearing the numbers * * *."

Followed by description of the patents, "and have applied for letters patent of the United States therefor, the applications bearing the serial numbers".

Followed by the numbers of the applications,

> "And whereas, the second party is desirous of obtaining an exclusive license under said application and letters patent that may issue for said inventions."

On September 6, 1930, when the agreement was made, every one of the patents described were upon devices which had been proven worthless. Application No. 323,103 had been rejected. The other application was on a device that likewise was unmarketable, and which Lavietes did not even try to sell. The only devices shown to the engineer and to Mr. Devereaux were the double arm and parallel arm regulators for which no applications had yet been filed. It is, therefore, inconceivable under those circumstances that it was intended by any of the parties to the agreement to limit it to the particular devices for which patents had issued or for which applications had been filed.

Paragraph 6 of Exhibit 158 provides that the parties of the first part, that is Lavietes and Roethel, shall diligently prosecute the application or applications for letters patent covering said inventions, and it also provides that the parties of the second part—that is, the Ferro Stamping and Manufacturing Co., shall have the privilege of *applying for* and securing patents in the event that parties of the first

part do not do so, and it may charge the expense of obtaining such patents against the royalty account. The sixth paragraph becomes meaningless if the contract is limited to the devices mentioned by number because patents had already issued, or applications had been filed for them already. That this was the intent is further shown by the second paragraph of the supplemental agreement, Exhibit 159, which provides:

> "It is hereby understood and agreed that all *inventions and improvements to the article* mentioned in the agreement between John H. Roethel and David P. Lavietes, and Ferro Stamping & Manufacturing Co., * * * that may be created by the said John H. Roethel, whether the same is developed while in the employ of the party of the second part or not, shall remain the sole and separate property of the said John H. Roethel, * * * provided, however, that the said party of the second part shall have the prior right and option to the manufacture and sale of said article *under the same agreements, terms and conditions as set forth in the before mentioned agreement.*" (Emphasis ours.)

The articles mentioned in Exhibit 158 are vehicle window regulators so the inventions and improvements to such article must mean inventions and improvements to vehicle window regulators. Under that paragraph the Ferro Co. obtained the right to the manufacture and sale of such inventions and improvements to the article mentioned under the same agreements, terms and conditions set forth in Exhibit 158. The agreements, terms and conditions in Exhibit 158 were, among other things, that the royalty must be paid to parties of the first part, that is, to David P. Lavietes, the plaintiff, and John H. Roethel, defendant.

When the attention of the trial court was called to this, he found that the double arm and parallel arm regulator

inventions were not included "in any of the contracts that I have."

The intention of the parties, as above indicated, is also consistent with the acts of the parties after the execution of the agreements. To assume that the defendants have paid Roethel a huge sum of money for royalties on devices not included in any agreement is absurd on its face. Indeed the defendant's position throughout the trial has been that the double arm and parallel arm regulator come within the scope of the third paragraph of Exhibit 159. Yet a reading of that paragraph clearly shows it had reference to articles "other than the one herein mentioned." The one herein mentioned was window regulators. Obviously, the third paragraph excludes inventions and any improvements on vehicle window regulators. Indeed counsel for the defendants in his briefs filed with the lower court made no effort at all to answer the plaintiff's argument upon proper construction of the contracts. Defendants' main argument was on the point that the bill was filed upon the theory of a conspiracy only, and that the testimony introduced by the defendants in the interference proceedings which testimony showed that Lavietes, the plaintiff, had a substantial interest in the inventions, was improperly admitted in evidence. Upon the undisputed evidence in this case and under the written contracts, the plaintiff is entitled to an accounting and a recovery of his share of the royalties.

B. Defendants Are Estopped From Claiming That Plaintiff-Appellant is Not Entitled to One-Half of the Royalties Under the Contract.

Defendants are estopped from claiming that the contracts were limited to the patents and applications described by number in Exhibit 158. The defendants' contention

that the evidence introduced by them in the interference proceedings was inadmissible in this case is clearly wrong. It was not only admissible but estops them from now asserting that Lavietes had no interest in the double arm or parallel arm inventions. Admissions, whether made orally by conduct or in writing, are always admissible as evidence to show that the contention of a party is not correct.

Daugherty v. *Byles,* 41 Mich. 61;
Fenton v. *Steere,* 76 Mich. 405;
Nielson v. *Eiler,* 248 Mich. 545;
Home Insurance Co. v. *Field,* 53 Ill. Appeal 119;
Sweetser v. *Jordan,* 211 Mass. 393.

22 *Corpus Juris,* p. 329, states:

> "So far as its competency in evidence is concerned, the admission may be made either in the case in which it is sought to be used or in some other action."

Any and all evidence even if introduced by the defendants in any other case is admissible as an admission against interest. The case, however, upon this point is far stronger than merely an admission.

The defendants by their letters and conduct induced the plaintiff to assist in the obtaining of a patent upon these two devices. Knowing that the plaintiff claimed a one-half interest in them, they offered plaintiff's testimony in the interference proceedings. As a result of that testimony among other things, Roethel obtained the patents. When the defendants introduced plaintiff's testimony in that case, it was offered as the truth. It was offered for the purpose of inducing the patent office to act upon it. It was offered with full knowledge of the plaintiff's claim. The defendants will not now be permitted to assert that the very testimony they themselves offered which they obtained by

misleading the plaintiff, and which induced the patent office to act in their favor, was not the truth. They can't assert that the plaintiff was telling the truth in the interference case and now assert that the same testimony was false.

Shelton v. *Southern Railroad Co.*, 225 Fed. 182;
Cline v. *Wilson*, 128 Mich. 255;
Billingsley v. *Gulick*, 256 Mich. 606;
Gates v. *Detroit Railroad Co.*, 158 Mich. 477;
People v. *Finn*, 162 Mich. 481;
Carver v. *Detroit & Saline Plank Road Co.*, 126 Mich. 458.

The plaintiff submits that the defendants are estopped from contending that the plaintiff is not entitled to one-half of the royalties.

C. Plaintiff-Appellant is Entitled to Recover upon an Accounting for the Royalties and Profits Received by the Defendants.

Plaintiff is entitled to recover upon an accounting for the royalties and profits received by the defendants upon the bill filed. The defendants contended vigorously that the court is limited to the question of conspiracy in deciding this case. As we have already indicated, the bill did charge conspiracy, but in addition thereto, it recited all of the facts relating to this case in detail so that even if the conspiracy were regarded as surplusage, it would yet assert a claim upon contract, reformation and accounting. Even if the bill had charged a conspiracy, when it charged all of the facts proven in the case giving the plaintiff relief upon contract, reformation and accounting would only involve the change of a legal conclusion and not any change in proof. Certainly a change in the legal conclusion is not even ground for an adjournment because of surprise.

But even if the bill had completely omitted mention of all of the facts necessary to sustain an action on contract under former Equity Rule 19, the present rule 15 (b) and under the decision of the Federal Courts, the plaintiff is entitled to the relief which his proofs indicate. In such a situation if an amendment to a pleading is necessary to cover the proofs admitted in a case, such amendment may be made even in the Appellate Court. A judicial proceeding is not merely an exercise in legal technicalities. The courts exist for the purpose of administering justice and to right wrongs and whenever it can be done, mere technicalities will be overlooked in order to attain justice. In the final analysis it is the proofs that determine questions of right and wrong.

The following cases, among others, have held that the decision must be based upon the proofs irrespective of technical deficiencies or omissions in the pleadings, and that if it is necessary the pleadings can be amended even in the Appellate Court, or they will be regarded as amended to make them conform to the proofs in the event that it becomes necessary to do so for the ends of justice.

E. R. Squibb & Son v. *Mollinck Chemical Works,* 69 F. (2d) 685;

Gulf Smokeless Coal Co. v. *Sutton, Steele & Steele,* 35 F. (2d) 433;

Walker Grain Co. v. *Southwestern Telephone & Telegraph Co.,* 10 F. (2d) 272;

Skinner Bros. Belting Co. v. *Oil Well Improvement Co.,* 54 F. (2d) 896;

A. C. Motor Freight Lines v. *Singledecker,* 70 F. (2d) 827.

Conclusion.

Because of the reasons hereinbefore set forth, plaintiff-appellant submits that he is entitled to the writ and relief prayed for in his petition.

Respectfully submitted,

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